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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1745

RAYMOND EDWARD BARBOUR,
Petitioner,

-v-

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

From a verdict of guilty of second degree murder and judgment of imprisonment entered by the Superior Court of Alamance County at the January 6, 1975 Session of that Court, the defendant appealed to the North Carolina Court of Appeals. The opinion of the North Carolina Court of Appeals (Intermediate Appellate Court) affirming the judgment of the trial court is reported in 28 N.C. App. 259, 220 S.E. 2d 812. The judgment of the Court below has been affirmed by the North Carolina Court of Appeals and by the Supreme Court of North Carolina with said judgment being filed by the latter Court denying the appeal and Petition for Writ of Certiorari on March 2, 1976. Petitioner then made an application for a

stay of execution pending Petition for Certiorari in the Supreme Court of the United States which was denied by the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and Circuit Justice of the 4th Circuit on May 12, 1976 and by the Court of Appeals of North Carolina on March 10, 1976 and by the Supreme Court of North Carolina on March 12, 1976.

The petitioner, in addition to the filing of his petition for a Writ of Certiorari, included a renewal of his application previously made for a stay of execution pending petition for Certiorari in this Court. The previous denials of the petitioner's application for stay of execution are contained in Appendix G, page 33, Appendix C, page 11, and Appendix D, page 12 - all as found in the Petition for Writ of Certiorari filed in June 1, 1976 in the Supreme Court of the United States in Case No. 75-1745.

JURISDICTION

The Jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I

WHETHER THE TRIAL JUDGE ERRED WHEN HE ALLEGEDLY SHIFTED THE BURDEN OF PROOF BY REQUIRING THE DEFENDANT TO PROVE THAT THERE WAS NO MALICE ON HIS PART WHICH PROCEDURE THE DEFENDANT ALLEGES VIOLATED DUE PROCESS REQUIREMENTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

II

WHETHER THE TRIAL JUDGE ERRED WHEN HE DENIED THE DEFENDANT'S MOTION FOR A MISTRIAL AFTER THE PROSECUTOR REMOVED AND THEN REPLACED A

BLOODY SHIRT BACK INTO A BAG IN THE PRESENCE OF THE JURY WHEN THE SHIRT ITSELF HAD NOT BEEN INTRODUCED INTO EVIDENCE

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal action to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

The Respondent feels that the evidentiary facts bearing upon guilt or innocence of the petitioner have been fully and accurately stated in the opinions below and in the Petition. For this reason, they will be repeated in abbreviated form under preliminary comment below. The procedural context of the case has also been accurately stated in the Petition and will not be repeated here.

The Respondent, however, feels that it would be of assistance to the Court to have before it the entire instructions

given to the jury by the trial Judge. To this end, therefore, the entire instructions are set forth exactly as they appear in the record on appeal in the State Court: (State court record page 163)

"Ladies and Gentlemen of the Jury, in the case on trial the defendant Raymond Edward Barbour comes into Court and is being tried upon a bill of indictment which I will read:

The jurors for the State upon their oath do present that Raymond Edward Barbour, late of the County of Alamance, on the 13th day of June, 1974, with force and arms at and in the said County, feloniously, wilfully and with malice of forethought and with premeditation and deliberation, did kill and murder William S. Abner contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

To that charge, the defendant has come into Court and through his attorney has entered a plea of Not Guilty. This plea entitled the defendant to a presumption of innocence which remains with him throughout this trial and until such time as you, and each of you, shall find him guilty of each and every element of that offense beyond a reasonable doubt.

Now, when I use the term "beyond a reasonable doubt" I am not talking to you about a vain or imaginary doubt. It is not necessary that the State satisfy you beyond every mathematical possibility. It is necessary that they satisfy you beyond a reasonable doubt and that is a common sense doubt one which is based upon the evidence or upon the lack of it. It means that you must be fully satisfied, entirely convinced and satisfied as we say to a moral certainty. So, when you come to weigh, consider and compare the evidence if you find your minds to be in such a state that you cannot say you have an abiding

faith to a moral certainty, then you have a reasonable doubt; otherwise, you would not.

The burden of proof in this case is upon the State of North Carolina from beginning to end. At no time does that burden ever shift over to the defendant. The defendant is not required to disprove the State's case, the State's case has failed unless it is able to satisfy you of his guilt beyond a reasonable doubt.

Now, as you have heard several times in the recapitulation of counsel, there are a number of possible verdicts which you may render. You may find the defendant guilty of Murder in the First Degree; Murder in the Second Degree; Voluntary Manslaughter; Involuntary Manslaughter, or you may find him Not Guilty.

The State says and contends in this case that you should be satisfied from the evidence and all of it of his guilt of the offense of Murder, that you should find him guilty. The defendant on the other hand says that you should not be so satisfied, that at the very least you should have a reasonable doubt as to his guilt, that you should not believe what the State's witnesses have said about it, that you should give him the benefit of that doubt, and that you should acquit him.

It is my responsibility in the case to recall for you briefly some of the evidence which has been offered by both the State and the Defendant. In neither instance shall I try to recall it all, but only so much as I consider necessary in order to explain the law which arises in the case. I would caution you at the outset that the fact that I will talk about some parts of the evidence and not other parts should not be taken by you as any indication that I attach any lesser significance to the things that I don't mention than to those things that I do mention. All of the evidence is important, all of it must be

considered by you and applied to the law which the Court will give you when you come to arrive at your verdict. I would further caution you as the attorneys have done that should your recollection of the evidence differ in anyway from theirs, or any of them, or should it differ from my recollection, you be guided by your own recollection. You are the sole judges of what the facts in the case are.

Now, the State of North Carolina has offered evidence which in substance tends to show that Mr. Alec Ahladas was employed at Zack's Cafe in Burlington on the night of the 13th of June, 1974, was about his employment and that a man known to him as William F. Abner came in around 9:30 P.M. That he was served with food and stayed there for some time, about fifteen minutes as the Court recalls and he left. That he was gone for about fifteen minutes and at the end of that time Mr. Ahladas heard some shot report or reports which sounded like to him like the sound of a pistol. That within a moment or two, Mr. Abner reappeared in the cafe. That he recalls him wearing, as his best recollection, a yellow shirt and some type of jacket. That he particularly noticed a red stain on the yellow shirt. That Mr. Abner when he came in said, "I have been shot." He was clutching his chest and that in a moment he was assisted to a place where he was laid on the floor.

The State further offered evidence which in substance tends to show that about this same time two men who worked in the back of the cafe came running into the dining area of it and Mr. Ahladas went back into the kitchen area and looked out a window or door and saw a man leaning upon an open automobile door, of a dark colored station wagon. That he then went back into the main area of the cafe and assisted in giving such first aid as he could to Mr. Abner and that he called the police.

The State further offered evidence which in substance tends to show that on this same occasion two men, one named Harold Wilkinson and one named Jarvis Price, both employees of Zack's were out on the sidewalk on the side of the cafe getting some fresh air and that they were sitting on bread boxes. The state further offered evidence which in substance tends to show that one of these witnesses saw a Pontiac automobile station wagon drive up, that this witness recognized Mr. Abner, and as the court recalls, that witness was Mr. Wilkinson. In any event, Mr. Abner was seen to get out of the car and to go into Zack's and that he later came out. That Mr. Wilkinson did not know the defendant Mr. Barbour, but that there were two other men in the Station wagon, one in the front seat and one in the back and that the man in the front was kind of turned around and talking or appeared to be talking with the man in the back.

The State has offered evidence which in substance tends to show that Mr. Barbour was seen to take a liquor bottle and turn it up and take a drink from the bottle. That on one occasion Mr. Barbour produced some type of hand gun and began to point it at people passing by in the street, and that on one occasion one of the persons from the cafe, as the Court recalls, Jarvis Price, saw the man in the front seat point a pistol at the man in the back seat. That some time after that Mr. Abner came back out of the cafe and walked up to the passenger's side of the station wagon.

The State further offered evidence which in substance tends to show that it appeared that Mr. Abner and the man in the front seat were arguing. That then Mr. Abner started back to the cafe, and the man in the front seat got out and said several times, "stop". That he then brought out a gun and cocked it on his left forearm and

laid his left forearm on the door of the station wagon and aimed the gun. That at this point the two witnesses each testified that they heard one shot. That Mr. Abner was then heard to say, "I have been shot," and that he continued to go on into the cafe.

Now, the State has further offered evidence which in substance tends to show that a man by the name of J. B. McDonald had been with Mr. Raymond Barbour, the defendant, and William Abner, the deceased, that some time that evening Mr. Abner had first come to his home before nine o'clock. That the two of them had gone to Mr. Barbour's home and that they had had a drink there. That they had then gone to a steak house where they had been turned away because the manager was ready to close and that they went to Zack's for the purpose of obtaining something to eat.

The State further offered evidence which in substance tends to show that when they got there Mr. Abner got out of the car and was gone some fifteen minutes and Mr. McDonald tended to doze or nap a while while he was gone. That about that time he felt something against his forehead and it was a gun and that Mr. Barbour who was seated in the front seat said, "I am going to shoot." That after some conversation in which Mr. Barbour demanded that Mr. McDonald take some type of pill which was refused, that Mr. McDonald was told to lie down in the seat which he did. That sometime after that Mr. Abner came back out and Mr. McDonald slipped out of the automobile and either ran or walked into the cafe. That just as he got in the cafe he heard a loud report. That he then saw Mr. Abner come in and Mr. Abner said he had been shot.

The State further offered evidence which in substance tends to show that Mr. McDonald had been drinking, but was not intoxicated,

although he was in his own opinion, under the influence of some intoxicating liquor. That he did not give his name to anyone, but intended to go home and call Mrs. Abner, that he caught a cab and left.

The State further offered evidence which in substance tends to show that police officers came and one of them found Mr. Barbour standing between two open doors of the Pontiac Station Wagon with his arms resting over one open door and with a gun in one of his hands. That upon being ordered to do so, he laid the gun on top of the car and submitted to search and other ammunition was found on his person.

The State further offered evidence which in substance tends to show that Mr. Frank Satterfield of the State Bureau of Investigation conducted a ballistics test upon a lead pellet or projectile which was found the next day upon the street near Zack's cafe and that he determined that the pellet was a slug from a thirty-eight caliber round of ammunition. That by testing, that by test firing he formed an opinion satisfactory to himself that the slug he found had been fired from the same weapon which the defendant had surrendered to Mr. Jerry Barbee of the Burlington Police Department.

The State further offered evidence which in substance tends to show that Mr. Edward Sharplee, Medical Doctor and Pathologist examined the body of Mr. William Abner and formed an opinion satisfactory to himself that the cause of death of Mr. Abner was from a ruptured, main pulmonary artery which in turn had been caused by a tearing from a bullet wound, the bullet having entered his back and having exited from his chest.

The State further offered evidence which in substance tends to show that some time after

the arrest of Mr. Barbour, Mrs. Pat Barber came to see him at the police station and that while there she was allowed to see him in the presence of the police officer and when she did see him she said to him, "tell me it is not true," and in response to that, Mr. Barbour said, "Yes, I shot him," that Mrs. Barbour asked, "Why," and that Mr. Barbour's answer was, "Because of you know what happened." That her answer was, "I can't believe it."

The State further offered evidence which in substance tends to show that Mr. Otis Christopher who worked at Zack's cafe was present when Mr. Abner came into the cafe with blood gushing from his chest and he administered to him as best he could, and that he had on a yellow short sleeve shirt with one pocket and he did not have on any jacket. Joseph Josey accompanied Mr. Abner's body to the hospital and no one removed anything from Mr. Abner's body in his presence.

The State further offered evidence which in substance tends to show that the weapon taken from Mr. Barbour was a two barrel gun, thirty-eight caliber and that the ammunition taken from him was thirty-eight caliber.

That is what some of the evidence for the State tends to show. What, in fact, it does show is for you to say and determine.

Now, the defendant on the other hand has offered evidence and the evidence for the defendant in substance tends to show that Mr. Barbour had known the deceased William Abner for sometime and that they had met through business and over a period of years had become friends. That Mr. Abner had visited in his home on a number of occasions. That in addition to this, Mr. Barbour and his wife had been guests of Mr. Abner on several trips to Atlanta, Myrtle

Beach, Las Vegas and other places. That in the course of some of his dealings with Mr. Abner he had seen things in his possession such as an article which was described as a pot pipe and a pouch of tobacco which appeared to Mr. Barber to have seeds in it and other things led Mr. Barbour to suspect that Mr. Abner was engaged in drug traffic. That he had been given a letter from the Chief of Police in Graham which he considered to be authorization on his part both to carry a weapon and to act as an undercover police officer, and he determined that he would make an investigation of Mr. Abner's activity. That as a result of this he set out to try to make a contract or arrangement with Mr. Abner whereby he could buy some type of drugs from him.

That on the night of the 13th of June, 1974, he had been in conversation with Mr. Abner earlier and was led to believe that Mr. Abner was prepared to sell him some drugs. That as a result of this he made a telephone call to the Chief of Police of Graham and asked him if he wanted him to make a buy and after a discussion about it it was determined that he would try to obtain some sample of whatever drugs was being talked about and any further decision would await that.

The defendant further offered evidence which in substance tends to show that on the night of the 13th Mr. Abner, together with Mr. McDonald came to Mr. Barbour's house and they all together went to the Western Steak House, that Mr. Barbour pretended to take a drink but did not because he was concerned with maintaining his sobriety, but when they got to the steak house they were unable to eat there and agreed to go to Zack's to get something to eat.

The defendant further offered evidence which in substance tends to show that after that they did go to Zack's and that Mr. Abner got out of the car and went in. That he was gone sometime and when he came back he - that is Mr. Abner - told Mr. McDonald to go in and get a hot dog. That as a result of what sounded to Mr. McDonald like a direction or order that Mr. McDonald did get out and go in. That at this point Mr. Abner walked up to the front door, opened it, and leaned in it, and that he opened his jacket so that Mr. Barbour could see the inside of his jacket and opened a bottle of some type and Mr. Barber was able to observe a quantity of pills in the jacket. That he sought to grab some of these pills and in the process of doing so the bottle was snatched up and he was able to get only two or three. That Mr. Abner then pushed him away with one of his knees and laughed and said, "let's go in and get a hot dog."

The defendant further offered evidence which in substance tends to show that at this point Mr. Barbour was laid over in the seat and dropped the pills he got. That he then told Mr. Abner that he was under arrest - it was at this point that Mr. Abner laughed, and that at this point Mr. Abner started walking away and Mr. Barbour called on him once to stop and he kept on walking and he called on him again to stop, that he kept on walking and he called to him a third time to stop. That at this point Mr. Abner looked back and made a gesture with one of his hands. That at this point Mr. Barbour took his pistol from his pocket, unholstered it, cocked it and prepared to fire into the air intending to fire a warning shot. That as he moved to the right to avoid an awning which was in the vicinity that his foot slipped and as he himself struck the open door of the station wagon the gun fired. That he was unable to say in which direction it pointed.

The defendant offered evidence which in substance tends to show that Mr. Abner kept on walking and Mr. Barbour was not aware that he had been struck with a bullet and that he stayed where he was believing that in his position there he could best control the entrance of the cafe, that he believed because of the shot having been fired the police would be there shortly.

The defendant further offered evidence which in substance tends to show the police did come and that it was at this point that he was told to surrender his gun which he did. That when Detective Hoggard came he gave him the letter which he was carrying in his wallet from the chief of police of Graham and told him it was an accident. He also told him about the pills which he had seen on Mr. Abner.

The defendant further offered evidence which in substance tends to show that he had no intent to kill Mr. Abner, nor did he have any reason to kill him, and that at all times while he was there in the car and at all times while he had the pistol in his pocket he believed himself to be acting in the capacity as a police officer.

The defendant further offered evidence which in substance tends to show that Mrs. Pat Barbour saw William Abner on the 7th of June at her home where he came with a girl and that she did not hear any conversation between he and her husband, that she does recall Mr. Abner calling Mr. Barbour from the kitchen and that later on Mr. Abner went out to the car and brought in some liquor and that on the next day she received a call from Mr. Abner from Myrtle Beach that she turned over to her husband.

The defendant further offered evidence which in substance tends to show that thereafter she and Mr. Barbour had an argument and she did not see him again until the night, or early

morning hours of June 14th when she learned that he was arrested and went to the police station That when she was allowed to see him he immediately told her that it was an accident and he said, "I am sorry, I am sorry," and that she said, "Why, why," and he then said, "I am sorry, I am sorry, it was an accident," and she then said, "I cannot believe it."

The defendant further offered evidence which in substance tends to show that a woman by the name of Catherine Jefferies was in the vicinity of Zack's on the 13th of June. That she heard a noise like a shot and saw a man who appeared to be bawling run in a direction away from Zack's and by a corner of the dress shop and observed him to throw something and then disappear, but the man did not look like either the defendant or Mr McDonald.

The defendant further offered evidence which in substance tends to show that Clarence Poteat a cab driver was the one who picked up Mr. McDonald and that he carried Mr. McDonald to some type of produce stand where Mr. McDonald made a purchase. That following this, he carried Mr. McDonald to a house where Mr. McDonald got out. That he observed when Mr. McDonald got out that in addition to a large bag which he had brought with him out of the produce market that he also reached into the foot of the cab and brought some other type of bag which he also carried with him.

The defendant offered evidence which in substance tends to show that in the opinion of Mr. Poteat that at the time he last saw Mr. McDonald he did not appear to be intoxicated although he could smell a moderate odor of alcohol on his breath

The defendant further offered evidence which in substance tends to show that Mr.

Hoggard in describing the way Jarvis Price told him how the defendant held the gun that he had held the gun in one hand and supported it over the wrist of the other hand other than across the forearm as Mr. Price testified in the trial.

Now, that is what some of the evidence for the defendant tends to show. What, in fact, if anything it does show is for you to say and determine.

Ladies and Gentlemen, I have not undertaken and will not undertake to give you all the contentions of counsel for the state or for the defendant. I would simply say in respect to that that the contentions as they have argued them to you here today are legitimate parts of the trial and they should be taken into consideration by you along with the evidence in the case and along with the law which the Court has undertaken to give you and should be taken - well, in addition to those contentions, any other contentions which come to your mind in the exercise of your good common sense.

Now, turning to the specific elements of the offense of which the defendant is charged. The Court instructs you the defendant has been accused of Murder in the First Degree. Under the law and evidence in this case it is your duty to return one of the following verdicts, as I have already mentioned to you, but we will talk about them again:

Guilty of First Degree Murder; Guilty of Second Degree Murder; Guilty of Voluntary Manslaughter; Guilty of Involuntary Manslaughter; or Not Guilty. One of those verdicts in the alternative you must render.

First Degree Murder is the unlawful killing of a human being with malice and with premeditation and with deliberation.

Second Degree Murder is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Voluntary Manslaughter is the unlawful killing of a human being, without malice and without premeditation and without deliberation.

Involuntary Manslaughter is the unintentional killing of a human being by an unlawful act, not amounting to a felony, or by an act down in a criminally negligent way.

I charge you that in order for you to find the defendant guilty of Murder in the First Degree it is necessary that the State - who has the burden of proof - satisfy you of five things beyond a reasonable doubt.

First, that the defendant acted intentionally and with malice, and that with the intent and with malice he shot William Abner with a deadly weapon and the Court charges you that a thirty-eight special derringer pistol is a deadly weapon within the meaning of the law.

Now, malice is not only hatred or illwill or spite as it is commonly known - to be sure that is malice - but it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death, without just cause, excuse or justification.

Second, the State must prove that the shooting of William Abner was a proximate cause of the death of William Abner.

Proximate cause is a real cause, a cause without which Mr. Abner's death would not have occurred.

Third, the State must prove beyond a reasonable doubt that Mr Barbour intended to kill William Abner.

Fourth, that the defendant acted after premeditation, that is, that he formed the intent to kill William Abner over some period of time, however, short, before he shot William Abner.

Now, with respect to premeditation, let me elaborate upon that, or re-emphasize it just by saying that our Courts have held that premeditation means thought of before hand for some length of time, however short.

And Fifth, the State must prove beyond a reasonable doubt that the defendant acted with deliberation which means that he acted while he was in a cool state of mind.

Again, to further elaborate upon that our Courts have said that deliberation means that the act is done in a cool state of the blood. It does not mean brooding over it, or reflecting upon it for a week, a day or an hour, or anyother approciable length of time, but it means an intent to kill, executed by the defendant in a cool state of blood in furtherance with a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose.

I have already defined malice.

If the State proves beyond a reasonable doubt that the defendant intentionally killed William Abner with a deadly weapon, or intentionally inflicted a wound upon William Abner with a deadly weapon which proximately caused his death, the law raises two presumptions; first, that the killing was unlawful, and second, that it was done with malice.

Now, Second Degree Murder differs from First Degree Murder in that neither the specific

intent to kill nor the premeditation, nor the deliberation is necessary.

In order for you to find the defendant guilty of Second Degree Murder, the State must prove beyond a reasonable doubt that the defendant intentionally shot William Abner with a deadly weapon thereby proximately causing his death. Then, nothing else appearing, the defendant would be guilty of Second Degree Murder.

Now, in order to reduce the crime to Manslaughter, the defendant must prove - not beyond a reasonable doubt, but simply to your satisfaction that there was no malice on his part. To negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:

First, that he shot William Abner in the heat of passion. Now, this doesn't mean mere anger. It means that the defendant's state of mine was at the time so violent as to overcome his reason, so much so that he could not think to the extent necessary to form the intent necessary to form the deliberate purpose and control his actions.

Second, he must satisfy you that this passion was produced by some action on the part of William Abner which the law regards as adequate provocation. That would consist of anything which has a natural tendency to produce such passion or frame of mind in a person of average mind and disposition.

Third, he must satisfy you that the shooting took place so soon after the provocation, whatever you may find that maybe, that the passion of a person of average mind and disposition would not have cooled.

Now, if you do not find the defendant guilty of voluntary manslaughter you must consider whether he is guilty of Involuntary Manslaughter.

Involuntary Manslaughter is the intentional killing of a human being by an unlawful act not amounting to a felony, or by an act done in a criminally negligent way.

For you to find the defendant guilty of Involuntary Manslaughter, the State must prove two things beyond a reasonable doubt.

First, that the defendant acted unlawfully or he acted in a criminally negligent way.

The defendant's act would have been unlawful if he made some assault upon William Abner, not amounting to a felony. Criminal negligence is more than mere carelessness. The defendant's act would be criminally negligent if by reasonable foresight it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.

Now, let me go back a moment and correct something I just said, Ladies and Gentlemen. Under the evidence in this case, if the defendant is guilty of involuntary manslaughter, it would only be upon the basis of criminal negligence; disregard what I said about an assault not amounting to a felony.

I will repeat that, for you to find the defendant guilty of Involuntary Manslaughter, the State must prove to you first, that the defendant acted in a criminally negligent way. Criminal negligence is more than mere carelessness. The defendant was criminally negligent if by reasonable foresight it was done with gross negligence or carelessness such as to amount to

a heedless indifference of the rights and safety of others.

And second, the State must prove that this criminally negligent act proximately caused the death of William Abner. If William Abner died by accident or misadventure, that is without wrongful purpose or criminal negligence on the part of the defendant, then the defendant would not be guilty.

The burden of proving accident is not on the defendant, it is merely a denial that he committed the crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

So, once again, to dwell just a moment on a definition of accident, our Courts have said that an accident is an event from an unknown cause or an unusual and unexpected event from a known cause. Homicide by misadventure is the accidental killing of another when the slayer is doing a lawful act unaccompanied by any criminal or culpable or reckless conduct. It is an unintentional killing in which the perpetrator had no wrong purpose in doing the act which caused death, unaccidentally and not negligently while he was engaged in no unlawful act.

There was some discussion by counsel on both sides with respect to motive and for that reason the Court will give you this instruction about motive as it applies generally.

Proof of motive for homicide is permissible and often valuable, but never essential for conviction. If you are convinced beyond a reasonable doubt that the defendant committed murder, the presence or absence of motive is immaterial. Motive maybe shown by positive evidence or by facts surrounding the act if they support a reasonable inference of motive. When

that is proved, motive becomes a circumstance to be considered by you. The absence of motive is equally a circumstances to be considered on the side of innocence.

Finally, with respect to these specific elements of the various offenses. I charge you that if you find from the evidence and beyond a reasonable doubt that on the 13th day of June, 1974, the defendant intentionally shot William Abner with a thirty-eight caliber derringer pistol, a deadly weapon, thereby proximately causing the death of William Abner; and that Mr. Barbour, the defendant, intended to kill William Abner, and that he acted with malice and premeditation and deliberation, it would be your duty to return a verdict of First Degree Murder.

However, if you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of First Degree Murder. Now, if you do not find the defendant guilty of First Degree Murder, you must determine whether he is guilty of Second Degree Murder. Of course, if you find him Guilty of First Degree Murder you would not consider these other alternatives.

If you do not find him guilty of First Degree Murder, you would consider whether he is guilty of Second Degree Murder.

If you find from the evidence and beyond a reasonable doubt that on or about the 13th day of June, 1974, Raymond Barbour, intentionally and with malice shot William Abner with a deadly weapon, that is, a thirty-eight caliber derringer pistol, thereby proximately causing William Abner's death, nothing else appearing, it would be your duty to return a verdict of guilty of Second Degree Murder. However, if you do not so find, or have a reasonable doubt as to one or more of these

things, you would not return a verdict of Second Degree Murder.

If you do not find the defendant guilty of Second Degree Murder, you must consider whether he is guilty of Voluntary Manslaughter.

If you find from the evidence and beyond a reasonable doubt that on about the 13th day of June, 1974, Raymond Barbour intentionally shot William Abner with a thirty-eight caliber derringer pistol, a deadly weapon, thereby proximately causing William Abner's death, if you are satisfied that the defendant killed without malice, it would be your duty to return a verdict of Voluntary Manslaughter. However, if you do not so find, or have a reasonable doubt as to one or more of these things, you would not return a verdict of Voluntary Manslaughter.

Now, if you do not find the defendant guilty of either degree of murder or voluntary manslaughter, then you must determine whether the defendant is guilty of involuntary manslaughter.

If you find from the evidence and beyond a reasonable doubt that on or about the 13th day of June, 1974, Raymond Barbour shot William Abner in a criminally negligent way, thereby proximately causing William Abner's death, it would be your duty to return a verdict of involuntary manslaughter. However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of Not Guilty.

Ladies and Gentlemen of the Jury, when you come to consider the evidence, the testimony and the weight you will give to the testimony of the different witnesses, the Court instructs you that it is your duty to carefully consider and scrutinize the testimony of the defendant when

he testified in his own behalf; also, those closely related to him, that is, in this case, Mrs. Barbour, and in passing upon the testimony of those witnesses you must take into consideration the interest the witnesses would naturally have in the outcome of the action. However, the Court instructs you that your duty to do so does not mean that you must reject or impeach the testimony of either of these witnesses. If you believe these witnesses have spoken the truth you must give to their testimony or to the testimony of either of them, the same weight you would give to any unbiased or disinterested witness. And that caution with respect to the testimony of Mr. Barbour and Mrs. Barbour applies to the testimony of any witness in the case which you might find to be an interested witness in the outcome of the action.

In passing upon the testimony of any of these witnesses, Ladies and Gentlemen, take into consideration the same things you would take into consideration in your every day life. Among these would be the ability that the witness had to know about the things concerning which he or she testified; the fairness or wont of fairness which you feel that witness showed; the reasonableness or the unreasonableness of what the witness said; and the apparent bias or prejudice that the witness might have appeared to you to have.

In going about your duty, it is not a question of sympathy for anybody or prejudice against anybody. You are sworn jurors with a duty to perform and that duty is to take the evidence as you have heard it, the arguments of counsel and the charge of the Court and render a verdict which speaks the truth because that is what the word verdict means.

This Court has no opinion as to what your verdict should be. If I did have such an opinion

it would be highly improper for me to express it and I would not do so under any circumstance. If by any ruling I have made, the inflection of my voice, or anything else has given you any impression that I have an opinion as to how you should decide this case, disregard your minds of that, because I do not.

The verdict of the jury must be unanimous, that is, agreed to by all twelve of you. I suggest that when you go to your juryroom you choose one of your number to act as a leader in your discussions and to speak for you when you come back to the courtroom. Remember when you do come back, you will be asked essentially this:

How do you find the defendant as to the charge of First Degree Murder, Guilty or Not Guilty. Should your verdict be Guilty, that would be the last question asked. If your verdict be Not Guilty, you would then be asked about Second Degree Murder. Your verdict would be either guilty or not guilty. If your verdict be guilty, you would be asked nothing else, but if Not Guilty, then you would be asked about Voluntary Manslaughter. If your verdict be guilty you would be asked nothing else. If it be Not Guilty you would then be asked about Involuntary Manslaughter, and your answer to that would be either guilty or not guilty.

Gentlemen, let me see you here a moment, please?

(Conference at the Bench)

THE COURT: (Let the record show that the Court asked counsel on both sides if they had anything further, any further instructions for the Court to give the jury, and all indicated nothing except the instructions previously filed with the Court.)

You may retire, Ladies and Gentlemen, and say how you find.

THE COURT: (To the thirteenth juror) It appears the other twelve are prepared to serve and you may be excused.

(The jury retires and deliberates to 9 o'clock P.M. at which time the Court has them to return to the courtroom.)

THE COURT: Ladies and Gentlemen, I called you back in to inquire about your progress. Which of you has been selected as the spokesman?

Answer: I have, Mr. Brown.

THE COURT: I would like to ask you one or two questions and before I do let me caution you not to tell me any more than I ask you because I don't want to get too deeply involved. But, of course, it is nine o'clock and I realize you have many things to talk about. Do you think generally, do you feel that further deliberations tonight would be fruitful and that all of the members of the jury wish to remain a while longer, we will be delighted to stay with you. On the other hand, you feel it might be better if we recess until tomorrow morning, do you have any thoughts as which way you would go timewise?

MR. BROWN: May I ask a question?

THE COURT: Yes?

MR. BROWN: I have a question about a point, should I ask you?

THE COURT: If you have a question about a point of law, yes.

MR. BROWN: Should we have a unanimous decision?

THE COURT: Yes, you must have a unanimous decision, that was one of the last things I said to you, I believe.

MR. BROWN: Guilty or Not Guilty whatever level we are on?

THE COURT: At whatever level you are on, that is right.

THE COURT: Well, now, for my other questions, do you feel you would rather talk to the other members about recess for tonight?

MR. BROWN: Yes.

THE COURT: You may retire and discuss that and come back in and let us know.

(Jury retires and returned to the Courtroom)

MR. BROWN: We have made a unanimous decision we would like to retire for tonight.

THE COURT: Let me ask you one thing further, perhaps I should have asked earlier. I am certain, the way I put it, I took for granted you would be willing to go into this in the morning. I don't want to offend anyone's religious scruples by Sunday activity on the jury. If somebody on the jury has some conscientious reservation about deliberating tomorrow morning I will be glad to respect that, does anybody feel that way about it.

(No hands raised)

THE COURT: Thank you very much. I think your decision is probably a wise one. I

make this caution somewhat related to what I have said to you everytime we have recessed, even now, don't discuss the case among yourselves or in groups. Remember all of your discussions and deliberations should be in the presence of all twelve in the juryroom tomorrow morning.

We will resume at nine o'clock in the morning.

(Evening recess)

THE COURT: Members of the Jury, I have nothing further to talk to you about it except to say as I said yesterday should you come across some question of the law you would like to ask me about let the Bailiff know and I will have all twelve of you to come back in and I will be glad to hear from you.

MR. BROWN: Will you refresh our memories of the verdicts?

THE COURT: Yes, sir. First Degree Murder is the unlawful killing of a human being with malice premeditation and with deliberation.

Second Degree Murder is the unlawful killing of a human being with malice but without premeditation and deliberation.

Voluntary Manslaughter is the unlawful killing of a human being without malice and without premeditation and without deliberation.

Involuntary Manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony, or by an act done in a criminally negligent way. You will recall I told you yesterday with respect to involuntary manslaughter you would only be considering if you reach the possible verdict, whether or not it was an act done in a criminally negligent way. Those then are the elements.

You may retire and resume your deliberations.

After deliberating until eleven o'clock, the jury announced they had reached a verdict and upon returning to the courtroom and questioned by the Clerk they announced, through their foreman, the verdict was Second Degree Murder. Whereupon, the counsel for defendant asked that the jury be polled. Upon being asked the question: Your foreman has returned a verdict of Guilty of Second Degree Murder, is this your verdict and do you still assent thereto- each juror answered in the affirmative.

Judgment of the Court: Let the defendant be confined in the State's Prison for a term of not less than thirty-five or more than forty years.

MR. ALLEN: Notice of Appeal to the Court of Appeals.

THE COURT: Let the record show notice of appeal given in open court. The defendant is given sixty days in which to prepare and serve case on appeal. The State is given thiry days thereafter to prepare and serve countercase.

$50,000.00 appearance bond."

PRELIMINARY COMMENT UPON THE FACTS AS PRESENTED

The evidence for the State tended to show that on the night of June 13, 1974, a man by the name of J. B. McDonald and the deceased, William Abner, drove to the home of the defendant. Thereafter, in the company of the defendant, the three gentlemen attempted to eat at a local steakhouse which

was closed and determined, upon this circumstance, to eat at a hotdog establishment in the City of Burlington known as "Zack's". Mr Abner parked the car and went into "Zack's" alone leaving the defendant and Mr. McDonald alone in the car on the street outside. One of two employees of "Zack's" who were then taking a break outside of the eating establishment witnessed that the defendant and the deceased engaged in an angry exchange at the automobile whereupon the victim proceeded in the direction of "Zack's". (R p 41) The State's evidence through these eyewitnesses further revealed that, contrary to the defendant's assertion that he repeatedly warned his victim to stop, the defendant called to Mr. Abner to stop only once or simply asked "Are you coming back?" (R pp 36 & 41). There was no evidence adduced through these eyewitnesses which indicated support for the defendant's contention that he struggled with the deceased and grabbed certain pills from him.

The State's witness, Harold Williamson, stated that, without further warning to the victim other than the question: "Was he coming back" (R p 36), the defendant took careful aim by resting his right arm on his left arm and discharged his weapon directly at the deceased (R p 37) in a straight and level manner (R p 37). Evidence was further adduced through the State's witness, Price, that he was approximately ten (10) feet (R p 39) from the car in which the defendant and the deceased and McDonald arrived at "Zack's", his place of employment. The State's witness, Price, also gave evidence that the defendant simply called for the victim to stop and then fired at him (R p 41) by putting his arm on the car and propping his right hand on his left arm (R p 41). The defendant advocates the position that, while acting as an officer under a letter of authority from the Burlington Chief of Police, he carried a gun which he had drawn from his holster to apprehend a friend who apparently was dealing in drugs. It is his contention that, as he fired a warning shot to stop Mr. Abner from going into a diner, he lost his balance while avoiding an overhead awning and the shot inadvertently went wild and hit the suspected drug dealer. To counterbalance this highly coincidental testimony offered by the defense, the State through its witnesses showed conclusively the following:

(1) Two eyewitnesses who worked for the eating establishment at the crime scene visually beheld the defendant and one of them saw the defendant argue briefly with his victim who proceeded in the direction of "Zack's" (R p 41). Their evidence contained the following additional information:

(a) The two eyewitnesses, at no point in their testimonies, corroborated the defendant's own assertion that he struggled with the deceased and grabbed some pills from his person immediately before the shooting; (R pp 30-46)

(b) The two eyewitnesses, Mr. Price and Mr. Williamson, in no way corroborated the defendant's testimony that he accidentally shot his victim while losing his balance in an effort to miss an awning with his warning shot - rather, both witnesses testified that the defendant appeared to take careful aim by resting his pistol in his right hand upon his left forearm; (R pp 37, 40)

(c) The evidence that was adduced through the State's eyewitness, Price, further revealed that the defendant positively did not lose his balance at the time that he fired the pistol; (R p 42)

(d) The State's witness, Price, further refuted the

defendant's contention that he, for the first time, withdrew his pistol from a holster as Abner turned and headed toward the dinette by giving evidence that the defendant, in fact, repeatedly aimed the pistol at passersby and at a companion who laid down on the back seat of the automobile; (R p 40)

The State, thereupon, continued the production of very damaging evidence to the defendant's case by offering evidence through the defendant's companion, Mr. McDonald, which clearly corroborated the testimony of the previous witnesses. Mr. McDonald stated:

(1) That he was awakened from his slumber on the back seat of Mr. Abner's automobile by a pistol being drawn directly to his head by the defendant who eventually forced him to get down on the back seat with a concurrent attempt to make him take a red capsule which he refused to accept (R p 48);

(2) That he heard the defendant and Mr. Abner talking as he rushed to gain entrance to the restaurant before hearing the shot (R p 49); and finally

(3) That he noted that the defendant was drinking while he sat in the car (in full corroboration of the State's witness, Price's, earlier testimony) (R p 50).

The State, thereafter, proceeded with certain technical evidence to connect physical evidence found at the crime scene to the pistol found in the defendant's hands. This evidence pointed unerringly to the fact that a wild, off-balanced shot probably did not come from the defendant's pistol when it is considered that the trajectory of the bullet that passed

through Mr. Abner was practically in a straight line and not in a diagonal direction (R p 78). Cumulatively, this evidence adduced through the pathologist would not be conducive to the defendant's argument that he made a wild shot as he fell for such a shot would likely not be in a straight line but would, rather, be diagonal or in a pronounced direction of a lower to higher entry-exit ratio.

It must be further argued that it was totally illogical that the defendant, as a reasonable man, even though clothed with what he presumed to be the authority of an undercover police officer, would have used such excessive force on a public street when the object of his warning shot was not making an escape, but, rather, heading into a dinette to eat a hotdog. And, should the State's evidence be believed, it certainly could not be argued that the necessary premeditation and deliberation as supportive of a first degree murder conviction was not in the record to support the first degree murder charge if testimony of eyewitnesses and the defendant's own companion were given any credence at all.

ARGUMENT

I

The trial Judge did not err in allegedly shifting the burden of proof upon the defendant to prove that there was no malice on his part. (Considering the special care indulged by the Court in its instruction that the burden of proof remained upon the State throughout the proceedings. (R p 164), and the totality of the aspects of the entire instruction) And, should this Court find that, under the trial Court's instruction as given in this case, that the burden of proof had been improperly shifted to the defendant - this offense and its trial in the Court below would not be subject to the effect of this Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) in that it was committed and tried before the decision in that case. The defendant, of course, argues that the *Mullaney* rule should be applied retroactively to which argument the State will, in response, refer this Court to its very thorough response filed in the Office of the Supreme Court of the United States in the case of *Johnny B. Hankerson, Petitioner v. The State of North Carolina, Respondent,*

October Term, 1975, Case No. 75-6568 which argument is specifically incorporated herein by reference and attached hereto as an addendum.

II

The Judge did not err in refusing to grant the defendant's motion for mistrial when the District Attorney drew forth a bloody shirt from a sack and, thereafter, did not introduce the shirt into evidence when he became aware of the odor that it contained.

Presumably, this prosecutor did not want to offend the sensibilities of the jury and, quite properly, decided against the shirt's introduction. The State is at a loss to understand how the introduction into evidence of this shirt and its prolonged exhibition to the jury would have been preferable from the standpoint of the defendant than was the prosecution's wise decision to withdraw the shirt from evidence when he determined its condition. The defendant's argument that there was no showing that the shirt in question was the same as that worn by the deceased at the time of the shooting, although it was in the same condition when it was delivered to the police is, likewise, untenable when it is considered that the prosecutor clearly withdrew this evidence and made no further attempt to qualify its introduction. When this matter was appealed to the North Carolina Court of Appeals, the defendant relied upon the case of *State v. Fleming*, 202 N.C. 512, 163 S.E. 2d 453 (1932) wherein it was stated that the introduction of such clothing and the prejudicial effect that might result in light of its shock value should limit such evidence unless the introduction sheds light on a material inquiry in the case. Further, the defendant cited the case of *State v. Atkinson*, 275 N.C. 288, 310-11, 167 S.E. 2d, 241, 254 (1969) wherein the Supreme Court of North Carolina defined material inquiries as:

> "Corroboration of the State's theory of the case, identification of the body, the showing of the location of the wound upon the person of the deceased, or, otherwise, the illustration of testimony of witnesses."

The State would strongly contend that the introduction of the bloody shirt, (had such offer been made), would have been entirely proper in light of these two case holdings. Not only would such evidence be of relevancy as corroborating the witness, Christopher's, immediately prior testimony concerning what he observed at the scene and the appearance and clothing of the defendant (R pp 148-150), but would, also, most importantly, have an effect upon the defendant's own alibi. In this connection, it should be remembered that the defendant contended that, as he fired the alleged warning shot at his victim, he slipped and consequently discharged a wild shot as he fell to the right (R p 119). The position, therefore, of the bloodstains upon the shirt of the deceased would, consequently, have a very important bearing upon the ascertainment of the path of the bullet and would be some evidence of extreme relevancy to either prove or disprove the defendant's alibi. For example, if the bloodstain appeared directly in the middle of the victim's back, the State's view of the evidence of a calculatingly aimed shot in a straight line from the defendant to Mr. Abner would be supported. On the other hand, a diagonal trajectory through the deceased's right side, as indicated by the bloodstain locations upon the deceased's shirt, both front and back would support the defendant's contention that he fired as he fell to his right after having slipped.

It is, therefore, apparent that this highly relevant evidence was not initially intended by the prosecutor to be introduced simply to excite prejudice or sympathy.

The trial Judge has the discretion to determine whether the misconduct of the prosecutor in exhibiting inflammatory items warrants a new trial.

> "The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial Court, and an impropriety must be sufficiently great to be prejudicial in order to entitle a defendant to a new trial. (Citation omitted.) See *State v. Parks,* 14 N.C. App 97, 99-100, 187 S.E. 2d 462, 464 (1972)."

As to the admissibility of bloodstained clothes worn by the victim, see, generally, Strong, *North Carolina Index 2d, Criminal Law,* Sec. 42.

CONCLUSION

The Respondent, State of North Carolina, although steadfastly believing that further appellate review of the Petitioner's trial is neither desirable nor justified, urges that, in the event that this Court decides to grant Certiorari, that it consider the entire instruction of the Court as set forth verbatim herein and thereupon decide whether the Supreme Court of North Carolina was in error by applying the *Mullaney* standards even prospectively to North Carolina. The Respondent urges, as heretofore developed in the Briefs submitted with this Court in regard to the *Hankerson* case (supra) that the law of the State of North Carolina is and always has been in full accord with the due process standards announced in *Mullaney*.

Respectfully submitted, this the 3rd day of September, 1976.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the Brief in Opposition to the Petition for Writ of Certiorari and Defendant's Renewal for his Original Motion for Stay of Execution upon opposing counsel by depositing a copy of the same in the United States Mail, postage prepaid, addressed to:

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This the 3rd day of September, 1976.

Thomas B. Wood

Thomas B. Wood
Assistant Attorney General